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No. 95-1455

In the Supreme Court of the United States

OCTOBER TERM, 1995

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT

v.

BOSSIER PARISH SCHOOL BOARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Appellee's Motion to Dismiss or Affirm underscores the appropriateness of review in this case, which raises important issues regarding (1) the correct standards for considering and assessing proof of discriminatory purpose under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, and (2) whether voting changes that clearly violate Section 2 of the Act, 42 U.S.C. 1973, are entitled to preclearance under Section 5.

1. Appellee acknowledges that the district court did not apply the established standard for evaluating

whether a governmental decision was motivated by a discriminatory purpose. Mot. to Aff. 11. Appellee contends that, although *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977), articulates the standard for assessing discriminatory purpose under the Constitution and Section 2, that standard "is not the appropriate standard for the 'extraordinary procedure' called for under Section 5." Mot. to Aff. 11. Neither appellee's assertion nor the district court's purpose analysis is consistent with this Court's decisions. The decision below also squarely conflicts with several other three-judge court decisions applying *Arlington Heights* to evaluate discriminatory purpose under Section 5. See J.S. 15 n.12.

Appellee contends (Mot. to Aff. 13-15) that there was no evidence that the School Board members knew, when they adopted the Police Jury plan, that it was feasible to create two reasonably compact majority-black districts. The stipulations it quotes, however, state that "*it was obvious* that a reasonably compact black majority district could be drawn within Bossier City," *id.* at 13 (quoting J.S. App. 76a (¶ 36)), and that the possibility of creating a second such district in the northern area of Bossier Parish was "*readily discernible*," Mot. to Aff. 14 (quoting J.S. App. 114a (¶ 148)) (emphases added). Given the undisputed evidence of racially polarized voting in Bossier Parish, J.S. App. 40a, 122a-127a (¶¶ 181-196), the quoted stipulations show that the Board must have been aware of the dilutive effect of the Police Jury plan on minority voting strength when the Board undertook its own redistricting in 1991. Had the district court considered all the relevant evidence, as it should have, and applied the correct

legal standard, it would have found a prohibited racially discriminatory purpose. The district court's decision must therefore be reversed. See J.S. 13, 14-22.[1]

2. Appellee's principal response to our contention that the Court should review the question whether Section 5 preclearance may properly be denied if the proposed voting change clearly violates Section 2 is to allege that the Justice Department denied preclearance based, not on a clear Section 2 violation, but on an impermissible "maximization policy" in violation of this Court's holding in *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995). Mot. to Aff. 8-9, 21. There is no basis, however—and appellee supplies none—for the contention that the Justice Department followed a "maximization" policy in denying the School Board's preclearance or in arguing against preclearance by the court in this case. The Justice Department's preclearance objection letter stated that "the school board is not required by Section 5 to adopt any particular plan," but must avoid "unnecessarily limit[ing] the opportunity for minority voters to elect their candidates of choice." J.S. App. 156a. The grounds for the objection included the fact that, in a context of racially polarized voting, and in the absence of any legitimate, nondiscriminatory justification, the proposed redistricting plan "would appear to provide *no* opportunity for black voters to elect a candidate of their choice to the school board." *Id.* at 155a (emphasis added). Similarly, in this litigation

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[1] Appellee does not address our contention (J.S. 17) that the district court erred as a matter of law in refusing to consider the Board's substantial history of discrimination against blacks.

the Department objected, not to appellee's failure to adopt two majority-black districts, but to its adoption of a plan including none.[2]

Appellee also suggests that any majority-black district would not adhere to traditional districting principles. Mot. to Aff. 2, 18-19. That suggestion is incorrect. For example, appellee contends that, outside Bossier City, "the * * * black population is scattered throughout the parish." Mot. to Aff. 2 & n.1. The parties stipulated, however, and the district court found, that, in addition to its concentration in Bossier City, "[t]he black population is also concentrated in Benton, Plain Dealing, Haughton, and in the unincorporated community of Princeton." J.S. App. 2a; see *id.* at 68a (¶ 10). Those four communities are located in the northern rural part of the parish, which

[2] Appellee repeatedly asserts, with no supporting evidence whatsoever, that Justice Department officials demonstrated improper and divisive racial attitudes during the preclearance process. See, *e.g.*, Mot. to Aff. 5, 20, 22, 24, 28-29. The only example appellee supplies—which it describes as "[t]he most pernicious phrase tossed about by the Justice Department"—was the Department's desire to protect "the right of blacks to elect candidates of their choice." *Id.* at 5 n.4. That phrase directly tracks the text of Section 2(b) of the Voting Rights Act, 42 U.S.C. 1973(b) (ensuring the ability of members of protected classes "to participate in the political process and to elect representatives of their choice"); see also *Thornburg* v. *Gingles*, 478 U.S. 30, 80 (1986) (finding Section 2 violation in the impairment of "the ability of geographically insular and politically cohesive groups of black voters * * * to elect candidates of their choice"). The phrase refers to the right of minority voters to participate meaningfully in the political process despite the fact that they and their candidates of choice have been victims of racially discriminatory voting practices, including vote dilution caused in part by white racial bloc voting.

is not densely populated. The general population dispersion in the northern part of the parish does not, however, mean that the black population there is not sufficiently concentrated relative to the area's overall population to permit the creation of a compact majority-black district in that area.

Appellee contends that, "[b]ecause the concentrations of black residences are so scattered, the Police Jury's cartographer was unable to draw any black-majority districts that were contiguous and compact." Mot. to Aff. 2. The parties stipulated, however, that it was feasible to create two reasonably compact majority-black districts in the parish. J.S. App. 76a (¶ 36), 82a-83a (¶ 53).[3] Appellee's cartographer admitted, moreover, that he "knew at that time [of redistricting] that drawing two black-

[3] Appellee refers (Mot. to Aff. 18 n.7, 19) to statements regarding compactness by one of the three judges presiding in *Knight* v. *McKeithen*, C.A. No. 94-848-A2 (M.D. La.). Those statements were dicta. *McKeithen* was an action by black voters seeking declaratory and injunctive relief to prevent implementation prior to preclearance of redistricting plans in several Louisiana parishes, including the plan for the Bossier Parish School Board. Plaintiffs in *McKeithen* proposed an alternative interim redistricting plan for Board elections similar but not identical to the Cooper plan in this case. The *McKeithen* court made no compactness holding and declined to adopt any interim plan. The compactness issue was never resolved because that case was dismissed with the parties' consent following the district court's decision in this case.

Contrary to appellee's contentions (Mot. to Aff. 18-19), William Cooper did not "admit[] to Judge Richey that his districts were not compact," nor did he "assure[] Judge Richey that compactness was of no real significance." He testified that, although compactness is difficult to define, he seeks to draw districts that are "as square and neatly bounded" as possible. II Tr. 178-179.

majority districts within Bossier Parish was 'statistically' possible, in that you could create two majority-black districts at a census block level with the correct population." *Id.* at 82a-83a (¶ 53). Although the cartographer stated that, in order to do so, one must "ignor[e] precinct considerations," *ibid.*, the Police Jury had authority to split precincts in redistricting, *id.* at 69a, 76a-77a, 82a, 84a (¶¶ 13, 38, 52, 57), the Police Jury itself did not adopt a plan with the minimum number of precinct splits, *id.* at 88a-89a (¶ 70), and the School Board itself "likely anticipated the necessity of splitting some precincts" during its own redistricting effort, *id.* at 29a, 95a (¶ 89). See also J.S. 22. Given all the circumstances, appellee's failure to create any majority-black districts for School Board elections constituted a clear violation of Section 2.[4]

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[4] Appellee suggests that its failure to adopt a plan with any majority-black districts was excusable because adopting a less dilutive plan would amount to "fashion[ing] districts solely or substantially for racial purposes" in violation of equal protection. Mot. to Aff. 19. It plainly was possible in this case, however, to draw one or two majority-black districts without "subordinat[ing] traditional race-neutral districting principles." *Miller*, 115 S. Ct. at 2488. The failure to adopt even a single majority-black district constituted a clear violation of Section 2 under *Thornburg* v. *Gingles*, 478 U.S. 30 (1986).

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For the reasons stated in our jurisdictional statement and herein, the Court should note probable jurisdiction.

Respectfully submitted.

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Solicitor General

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